



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Kent Owen Westgard

Heard: April 29, 2010 in Calgary, Alberta
Reasons for Decision: July 15, 2010

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.
Agnes Morrison
Darren Gross

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
)	Canada
Kent Westgard)	Did Not Attend
)	

INTRODUCTORY

1. An interview of Kent Owen Westgard (the “Respondent”) by the MFDA was scheduled, through the Respondent’s counsel, to take place on May 7, 2009. The Respondent’s counsel attended at the designated time and place for the interview but the Respondent did not attend and the interview could not proceed. The Respondent’s counsel subsequently advised MFDA Staff that the Respondent was out of town, had not received his counsel’s letters about the interview and forgot about the scheduled interview date. A further interview of the Respondent was scheduled to take place on July 28, 2009. On July 24, 2009 the Respondent’s counsel contacted Harold Eric Wenzel of the MFDA advising that the Respondent would not attend the interview nor would he attend any further interviews relating to the investigation. Requests have been made for the Respondent to provide bank record information and other documents but the Respondent has failed or refused to deliver the requested documents and information (including a written statement).

2. On December 21, 2009 the Mutual Fund Dealers Association of Canada (the “MFDA”) issued a Notice of Hearing pursuant to sections 20 and 24 of MFDA By-law No. 1 in respect of a disciplinary proceeding commenced against the Respondent. The Notice of Hearing was personally served on the Respondent. With the letter and the Notice of Hearing, the Respondent was provided with the MFDA’s Rules of Procedure and the MFDA’s Guide to the Disciplinary Hearing Process.

3. The first appearance in this proceeding took place by teleconference before the Hearing Panel on January 12, 2010. The Respondent was represented in the teleconference by counsel. The Hearing Panel made an Order requiring disclosures by each party by February 17, 2010, and witness statements and a witness list by March 12, 2010. It was further ordered that the hearing of this matter on its merits be scheduled to be heard on April 29 and 30, 2010 at a location to be announced in Calgary, commencing at 10:00 a.m. (Mountain).

4. On January 30, 2010 the Respondent’s counsel advised that he had not been retained to conduct the hearing on April 29 and 30, and that the Respondent could be contacted directly. A letter was sent to the Respondent dated February 1, 2010 attaching the Hearing Panel’s Order of

January 12. On February 3, 2010 Enforcement Counsel for the MFDA sent a letter to the Respondent by regular and registered mail advising that the hearing on the merits would be proceeding as ordered on April 29 and 30, 2010 and a further letter dated April 8, 2010 was sent to the Respondent advising him of the location of the April 29 and 30, 2010 hearing. By personal service on April 23, 2010, a copy of the Affidavit of Mr. Wenzel was served on the Respondent and on April 27, 2010, by Federal Express, copies of the “Submissions of the Staff” and “Staff’s Book of Authorities” were provided to the Respondent.

5. One or two days prior to the hearing scheduled for April 29, 2010, the Respondent contacted a representative of the MFDA by telephone suggesting he was seeking an adjournment. The Respondent was advised that he would have to attend the scheduled hearing and make representations to the Hearing Panel about an adjournment. To determine whether he would be attending the Hearing the MFDA attempted three times to contact the Respondent at the phone number given by the Respondent. There was no answer. The Respondent did not make further contact and did not attend the scheduled Hearing on April 29.

THE ALLEGATIONS (NOTICE OF HEARING)

6. By Notice of Hearing dated December 21, 2009 (Exhibit 1) the MFDA alleged the following violations by the Respondent of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between July 2003 and May 2006, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, referring or facilitating the sale of investments to clients that had not been approved by the Member, contrary to MFDA Rules 1.1.1.(a) and 2.1.1.

Allegation #2: Between July 2003 and May 2006, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling, referring or facilitating the sale of investments to clients, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #3: Commencing January 9, 2009, the Respondent has failed or refused to provide documents and information requested by the MFDA for the purpose of investigating the Respondent’s conduct, contrary to s. 22.1 of MFDA By-law No. 1.

7. The Respondent did not file a Reply to the Notice of Hearing.

SERVICE; FAILURE TO REPLY; FAILURE TO ATTEND

8. We have referenced, in the “Introductory” section above, the steps taken by the MFDA and the extent of participation by the Respondent in these proceedings. We are satisfied, from affidavits presented to this Panel, that all steps required to be taken have been taken by the MFDA and that the Respondent has been served with all necessary documents (including the Submissions of Staff of the MFDA and the MFDA Book of Authorities). We are satisfied that the Respondent was aware of this Hearing and chose not to attend. We are also satisfied that the Respondent has failed to comply with the Order of this Panel dated January 12, 2010, to provide disclosure to the MFDA by February 17, 2010 and to provide witness statements and a witness list by March 12, 2010.

9. The Rules of Procedure of the MFDA, updated August 21, 2006, provide:

7.3 Failure to Attend Hearing

- (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
 - (a) proceed with the hearing without further notice to and in the absence of the Respondent;

8.1 Requirement to Reply

- (1) A Respondent shall serve on every other party and file a Reply within 20 days of the effective date of service of the Notice of Hearing.

8.4 Effect of Failure to Deliver a Proper Reply

- (1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:
 - (a) proceed with the hearing without further notice to and in the absence of the Respondent;

13.5 Where a Respondent Fails to Attend a Disciplinary Hearing

- (1) Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance with Rule 7.3.

10. We are satisfied that it was in the public interest to proceed with the Hearing in the absence of the Respondent, and we so directed.

NATURE OF THE EVIDENCE AND APPLICABLE RULES

11. The evidence submitted by the MFDA was entirely by Affidavit of Harold Eric Wenzel. Mr. Wenzel is an investigator with the Enforcement Department of the Prairie Regional Office of the MFDA and has held that position since November 26, 2007. He conducted the investigation with respect to the allegations against the Respondent. An extensive Affidavit of Mr. Wenzel, with many exhibits, was entered in evidence (Exhibit 5). The Affidavit is sworn in support of the disciplinary proceedings being conducted against the Respondent. In his Affidavit Mr. Wenzel traces the registration history of the Respondent and his investigation of the evidence supporting the allegations against the Respondent including discussions with Andrew Traetto, who was then a Case Assessment Analyst with the MFDA. Mr. Traetto had discussions with the Member with whom the Respondent was registered as a mutual fund salesperson and by whom the Respondent was “terminated for cause” on October 31, 2007. Mr. Wenzel reviewed the interviews of the Respondent by the Member, the limited documents provided by the Respondent to the MFDA as well as the Member’s discussions with, and interviews of, the clients who had launched complaints against the Respondent. Mr. Wenzel also referred to discussions he himself had with a representative of the Member and contact he had by letter and telephone with the then Respondent’s counsel.

12. The MFDA Rules of Procedure include:

1.6 Admissibility of Evidence

- (1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

13.4 Evidence by Sworn Statement

(1) The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

13. We are satisfied that the Affidavit of Mr. Wenzel constituted admissible evidence.

ORDER FOR CONFIDENTIALITY

14. Enforcement Counsel advised the Hearing Panel that the Affidavit of Mr. Wenzel (Exhibit 5) contains sensitive client information, including the names of clients. He requested that the Affidavit be marked as “Confidential” pursuant to Rules 1.8(2) and (5) of the MFDA Rules of Procedure, which provide:

1.8 Hearings Open to the Public

(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

(5) Exhibits, documents and transcripts relating to that part of a hearing that is held in the absence of the public shall be marked “Confidential” and shall be kept separate from the public record, and access to this material shall only be by order of the Panel

15. We ordered Exhibit 5 be marked as confidential and confirmed that any references to clients in our Reasons for Decision would be by initials.

THE EVIDENCE¹

Registration History

¹ The Hearing Panel has set out, below, a summary of the evidence presented in the “Submissions of Staff of the MFDA”, from the evidence contained in the Affidavit of Harold Eric Wenzel (Exhibit 5), together with a summary of portions of the Affidavit of Mr. Wenzel.

16. From May 20, 2004 to October 31, 2007, the Respondent was registered in Alberta as a mutual fund salesperson with AEGON Dealer Services Canada Inc. (“AEGON”). The Respondent was formerly registered as a mutual fund salesperson with Great Western Financial Corporation from August 1998 to May 2004.

17. The Respondent was terminated for cause by AEGON on October 31, 2007, arising out of the Respondent engaging a client in a private investment not available through AEGON, and accepting a \$22,000 payment from the client directly into his bank account.

18. The Respondent is currently not registered in the securities industry in any capacity

19. On or about September 30, 2008, AEGON and Investia Financial Services Inc. (“Investia”) amalgamated at which time the business was carried on under the name Investia. AEGON became a Member of the MFDA on March 13, 2002, and Investia became a Member of the MFDA on June 7, 2002. AEGON and Investia are referred to collectively herein as the “Member”.

Allegation #1 – Securities Related Business Outside the Member

20. **Client KF:** In or about October 2004, the Respondent recommended an investment opportunity to client KF by telling her that this investment would yield a high rate of return within a short period of time, but he did not provide KF with any details or materials pertaining to this investment. KF agreed to purchase the investment based on the Respondent’s recommendation. On or about October 15, 2004, KF redeemed mutual funds held in her account at the Member for the purpose of applying the proceeds towards the purchase of the investment, and wrote a personal cheque in the amount of \$22,000 payable to the Respondent personally, who then deposited the cheque in his bank account. The Respondent admitted to Staff of the MFDA and to the Member that the investment was in “oil royalties” or “petroleum crude marketing” through a third party, who was associated with a company called “BRSK Management”.

21. **Client CI:** Between July 2003 and May 2006, the Respondent recommended an investment opportunity to client CI, a friend and business partner of KF. The Respondent described this investment to CI as an opportunity to double her money in six months. The investment was similar to that in which KF had invested. CI provided the Respondent with \$10,000 to purchase the investment on her behalf. CI eventually received her money in return only after threatening the Respondent with legal action.

22. **Client BM:** In or about July 2003, the Respondent recommended an investment opportunity to client BM, who had known the Respondent for over 15 years. The Respondent told BM that the investment involved raising money that would be used to assist an unnamed client of the Respondent to bring \$15 million into Canada. The Respondent told BM that he required money in order to pay taxes in relation to the funds being brought into the country. The Respondent offered BM a rate of return of 100% within one year. The Respondent did not provide BM with any further details or materials pertaining to the investment. BM provided the Respondent with two cheques totalling \$16,000 payable to the Respondent personally to be used to purchase the investment, which the Respondent deposited into his bank account.

23. The Respondent has failed or refused to return or otherwise account for the monies provided to him by KF and BM totalling approximately \$38,000, and there is no reasonable prospect of recovering the monies.

24. In addition, there is evidence of an additional complaint filed against the Respondent for failing to account for client CO's monies. This complaint pertains to conduct that occurred in approximately 1999, substantially prior to the MFDA's jurisdiction over the Respondent.

25. None of the investments described above had been approved by the Member for sale by the Respondent. The Respondent never disclosed to the Member the outside business activity.

Allegation #2 – Dual Occupation

26. The position of the MFDA is that in the event that the Respondent's activities set out above under Allegation #1 did not constitute securities related business, then the Respondent had

and continued in another gainful occupation that was not disclosed to and approved by the Member.

Allegation #3 – Failure to Cooperate

27. The Respondent has failed or refused to (a) deliver requested documents and information, (b) provide a written statement, and (c) attend at an interview to provide information relevant to the investigation.

SUBMISSIONS OF THE ASSOCIATION ON THE ALLEGATIONS

28. At the Hearing, Enforcement Counsel for the MFDA summarized the Association's position which is set forth in written "Submissions of Staff of the MFDA" and "Book of Authorities".

Allegation #1 – Securities Related Business Outside the Member

29. MFDA Rule 1.1.1(a) prohibits an Approved Person from engaging in securities related business in any form that is not carried on for the account of the Member through the facilities of the Member, and in accordance with MFDA By-laws and Rules. Rule 1.1.1(a) of the MFDA Rules provides:

1.1 BUSINESS STRUCTURES

1.1.1 **Members.** No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

- a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than: *(not applicable in this case)*

30. MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

MFDA Rule 1.1.1(a) creates a regime whereby an Approved Person is only permitted to sell investment products that have first been approved for sale by the Member (following appropriate product due diligence) and which are sold through the facilities of the Member (thereby ensuring the trading activity is subject to appropriate review and supervision). By limiting the authority of an Approved Person to trade only in securities approved for sale by the Member and through the facilities of the Member, MFDA Rule 1.1.1(a) protects primarily the interest of Member clients, but also the interests of Members and Approved Persons.

Thomson [2004] I.D.A.C.D. No. 49 (Pacific District Council), Hearing Panel Decision dated August 3, 2004, at paras. 58-60

Allegation #2 – Dual Occupation

31. MFDA Hearing Panels have consistently found that engaging in gainful occupation outside the business of the Member without so advising the Member and obtaining the approval of the Member, contrary to MFDA Rule 1.2.1.(d)(iii), is a serious offence. The Rule provides:

1.2.1 Salespersons

(d) **Dual Occupations.** An approved Person may have, and continue in, another gainful occupation, provided that:

(iii) *Member approval.* The Member for which the Approved Person carries on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation;

32. This Rule seeks to ensure that: securities legislation and internal procedures are being complied with; clients are aware that the outside activity is not the business or responsibility of the Member; any actual or potential conflicts of interest are dealt with appropriately; and the MFDA, its Members, and the mutual fund industry are not being brought into disrepute by way of improper or inappropriate outside business activities carried on by Approved Persons.

Jawad Rathore [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200504, Hearing Panel Decision dated May 31, 2005, at p. 14.

Lip Fee Chan (also known as Philip Chan) [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200607 (“*Chan*”), Hearing Panel Decision dated April 3, 2006, at p. 4.

33. It is submitted that, in the event that the Respondent's activities as described in Allegation #1 did not constitute securities related business, by engaging in those same activities the Respondent engaged in another gainful occupation, contrary to MFDA Rule 1.2.1(d) and Rule 2.1.1. That Rule provides:

2.1.1 **Standard of Conduct.** Each Member and each Approved Person of a Member shall:

- (a) deal fairly, honestly and in good faith with its clients;
- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

Allegation #3 – Failure to Cooperate

34. The MFDA has a duty to conduct examinations and investigations of a Member, Approved Person and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA. In carrying out this duty, the MFDA is authorized to require a Member, Approved Person or any other person under its jurisdiction to:

- (a) submit a report in writing with regard to any matter involved in any such investigation;
- (b) produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
- (c) attend and give information respecting any such matters.

Section 22.1 of MFDA By-law No. 1

35. MFDA Hearing Panels have consistently found that a failure by an Approved Person to cooperate with an MFDA investigation by failing to: provide information, documents, a written report, or attend at an interview when requested to do so, is serious misconduct, and constitutes a failure to cooperate contrary to s. 22.1 of MFDA By-law No. 1

Kevin Desbois [2009] Hearing Panel of the Central Regional Council, MFDA File No. 200822, Hearing Panel Decision dated March 16, 2009, at paras. 7-9

Robert Brick [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200705, Hearing Panel Decision dated October 29, 2007, at pp. 15-16

Arnold Tonnies [2005] Hearing of the Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005, at pp. 19-20

36. In arriving at this conclusion, MFDA Hearing Panels have cited with approval the decision in *Artinian v. College of Physicians and Surgeons of Ontario*, where the Ontario Divisional Court stated that, fundamentally, every professional has an obligation to cooperate with his self-governing body

Artinian v. College of Physicians and Surgeons of Ontario [1990], 73 O.R. (2d) 704 (Div. Ct.)

Tonnies, supra at pp. 19, 20

37. The failure of an Approved Person to comply with a request made by MFDA Staff pursuant to s. 22.1 of By-law No. 1 is serious misconduct in that it subverts the ability of the MFDA to perform its regulatory function by fully investigating a matter and determining all of the relevant facts and the full extent and implications of the underlying events. The failure to provide information requested in an investigation therefore undermines the integrity of the self-regulatory system and the effectiveness of its operation.

Desbois, supra at paras. 7-9

38. To date, the Respondent has failed or refused to deliver the requested documents and information (including a written statement), and has refused to attend at an interview to provide information relevant to MFDA Staff's investigation. As a result of the Respondent's failure to cooperate in MFDA Staff's investigation described above, MFDA Staff has been unable to

determine the full nature and extent of the Respondent's involvement in the activities described in Allegations #1 and #2.

SUBMISSIONS OF THE ASSOCIATION ON PENALTY AND COSTS

39. MFDA Staff seeks penalties against the Respondent as follows:

- (a) a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member;
- (b) a fine of \$50,000 with respect to either Allegation #1 (securities related business outside the Member) or Allegation #2 (dual occupation); and
- (c) a fine of \$50,000 with respect to Allegation #3 (failure to cooperate).

40. The primary goal of securities regulation is the protection of the investor.

Pezim v. British Columbia (Superintendent of Brokers), [1994], S.C.J. 58, Iacobucci, J. at paras. 59 and 68

Tonnies, supra at p. 21

41. It is submitted that when determining the appropriate sanctions to impose, a Hearing Panel should consider:

- (a) the protection of the investing public;
- (b) the integrity of the securities markets;
- (c) specific and general deterrence;
- (d) the protection of the MFDA's membership; and
- (e) the protection of the integrity of the MFDA's enforcement processes.

Tonnies, supra at p. 22

42. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (a) The seriousness of the allegations proved against the Respondent;
- (b) The Respondent's past conduct, including prior sanctions;
- (c) The Respondent's experience and level of activity in the capital markets;
- (d) Whether the Respondent recognizes the seriousness of the improper activity;
- (e) The harm suffered by investors as a result of the Respondent's activities;
- (f) The benefits received by the Respondent as a result of the improper activity;
- (g) The risk of investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- (h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- (i) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- (j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- (k) Previous decisions made in similar circumstances

Lamoureux [2002] A.S.C.D. No. 125 at para. 11

Tonnies, supra at p. 23

43. An additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings are the MFDA Penalty Guidelines. The Penalty Guidelines are intended to assist Hearing Panels, MFDA Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. As stated in the introduction of the Penalty Guidelines under the heading "Purpose Of The MFDA Penalty Guidelines":

Range Is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.

44. The MFDA Penalty Guidelines recommend for:

- Securities Related Business: minimum fine of \$10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition;
- Outside Business Activity: minimum fine of \$10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; permanent prohibition; and
- Failure to Cooperate: a minimum fine of \$50,000; and the termination of the Member or a permanent prohibition of an Approved Person.

45. It is submitted that the penalties sought by MFDA Staff in the present case are appropriate because of the seriousness of the misconduct, investor harm, the Respondent's failure to recognize the seriousness of his misconduct and the benefits received by the Respondent. Although the Respondent has no past disciplinary history with the MFDA, it is submitted that this factor should be given very little weight in light of the serious nature of his misconduct.

46. Generally, Hearing Panels have imposed similar sanctions to those sought in the present case in cases involving respondents engaging in securities related business or a dual occupation outside the member.

Chan, supra at pp. 4-5

Wayne Larson [2009] Hearing Panel of the Prairie Regional Council, MFDA File No. 200866, Hearing Panel Decision dated October 14, 2009, at pp. 26 and 28

Ernest Ming Chung Lo [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200512, MFDA Hearing Panel, Reasons for Decision dated April 3, 2006, pp. 12 and 15

Van der Velden and Stokman [2005] Hearing Panel of the Central Regional Council, MFDA File No. 200507, Panel Decision dated October 14, 2005, p. 3

47. In matters involving a failure to cooperate with MFDA Staff, Hearing Panels have generally imposed penalties of a permanent prohibition and a \$50,000 fine against Respondents.

Desbois, supra at para. 10

Brick, supra at p. 20

Tonnies, supra at p. 26

See also:

Earl Crackower [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200506, Hearing Panel Decision dated August 22, 2006, at p. 9

Stephan Headley [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200509, Hearing Panel Decision dated February 21, 2006, at p. 24

48. The proposed penalties reflect the seriousness of the Respondent's misconduct and are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by its Members and Approved Persons. The proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the securities industry. The proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

COSTS

49. MFDA Staff also request that an order for costs be made against the Respondent in the amount of \$7,500. This amount will permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and this Hearing, such that these costs do not have to be borne by the MFDA or subsidized by those Members and Approved Persons of the MFDA who do not engage in this type of activity. This amount of costs is also within the range of amounts awarded by MFDA Hearing Panels in the decisions listed above.

DECISION ON THE ALLEGATIONS

50. It is difficult, without the Respondent having cooperated and provided further information to the MFDA, to determine whether the transactions with clients involved, or did not involve, securities. We agree with the approach of the MFDA in presenting Allegations #1 and

#2 in the alternative and we adopt the reasons stated in *Chan*, supra at p. 3:

...It is not clear whether either or both transactions involve securities. To the extent that the transactions did involve securities, the Respondent engaged in a securities-related business outside the accounts and facilities of Investia. To the extent that the transactions did not involve securities, the Respondent engaged in a gainful occupation outside the business of Investia without advising Investia and obtaining its approval. The violations in Allegation #1 and/or the alternative violation in Allegation #2 have been established.

51. We agree with, and adopt, the submissions of Enforcement Counsel for the MFDA (above) and, as stated at the conclusion of the Hearing, we unanimously find that the MFDA has proven either Allegation #1 or #2, and has proven Allegation #3.

52. With respect to Allegation #1 the Hearing Panel in *Thomson*, supra, referred to the Conduct and Practices Handbook (“CPH”) in the course offered by the Canadian Securities Institute, and stated, at paras. 59, 60:

59 In explaining the purpose behind this standard, the CPH observes that such activities done by a registered representative employee without the knowledge of the member firm employer prevents the effective supervision of the handling of client accounts by the member firm and may expose the member firm to vicarious liability for the suitability of the transaction for the investor.

60 This provision is for the protection of the investors, as well as member firms. When a transaction is done off the books, the Association member loses the ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor.

53. With respect to Allegation #2, the Hearing Panel in *Rathore*, above, stated at p. 14:

...Turning first to the charge of engaging in gainful occupation outside the business of the Member without so advising the Member and obtaining the approval of the Member, contrary to MFDA Rule 1.2.1(d)(iii), we agree with counsel for MFDA that this is a serious offence. Where an Approved Person is engaged in an outside business activity, the Approved Person must disclose that activity to the Member so as to permit the Member to meet the requirements imposed by Rule 1.2.1(d). As counsel for MFDA pointed out, without disclosure of the dual occupation, the MFDA and the Member cannot ensure that securities legislation and internal procedures are being complied with, that the MFDA and its Members or the mutual fund industry are not being brought into disrepute, that

clients are aware that the outside activity is not the business or responsibility of the Member and that any actual or potential conflicts of interest are dealt with appropriately.

54. With respect to Allegation #3, many Hearing Panels, including those referenced above, establish that there is no doubt that failure to cooperate with an MFDA investigation is very serious misconduct, for all the reasons stated by Enforcement Counsel in his submissions, above.

DECISION ON PENALTY AND COSTS

55. Again, we accept and adopt the submissions of Enforcement Counsel for the MFDA including the factors which a Hearing Panel should consider in exercising its discretion to impose penalties.

56. Many decisions of Hearing Panels, in circumstances similar to those in the present case, support the penalties proposed, and the costs sought, by the MFDA in this case. We take into account the protection of the investing public, the integrity of the securities markets, specific and general deterrence, the protection of the MFDA's membership and the protection of the integrity of the MFDA's enforcement processes. We recognize that the Respondent has no disciplinary history but do not consider that it mitigates against the imposition of severe penalties in the circumstances of this case.

57. The Panel's unanimous decision on penalty (given at the conclusion of the Hearing) is as follows:

- (a) A permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member.
- (b) A fine of \$50,000 with respect to either Allegation #1 (securities related business outside the Member) or Allegation #2 (dual occupation).
- (c) A fine of \$50,000 with respect to Allegation #3 (failure to cooperate).
- (d) Costs of \$7,500.

DATED this 15th day of July, 2010.

“Alan V. M. Beattie”

Alan V. M. Beattie, Q.C., Chair

“Agnes Morrison”

Agnes Morrison,
Industry Representative

“Darren Gross”

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